identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 27 2007
LIN 07 032 53861

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Laura Dadrich
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a systems integration and information business. It seeks to employ the beneficiary permanently in the United States as a systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered did not require a member of the professions holding an advanced degree.

On appeal, counsel asserted that the beneficiary meets the statutory requirements for the classification sought and that the director erroneously relied on 8 C.F.R. § 204.5(k)(3)(B) rather than the statute. Counsel further asserted that he would submit a brief and additional evidence to this office within 30 days. Counsel dated the appeal June 12, 2007. As of November 28, 2007, this office had received nothing further. Thus, this office contacted counsel by facsimile and inquired as to whether a brief had been timely submitted and, if so, requested a copy of that brief. In response, counsel asserted that he was overseas and requested that the appeal be adjudicated based on the record.

Contrary to counsel's implication on appeal, the director did not question the beneficiary's qualifications. Rather, the director concluded that the job did not require a member of the professions holding an advanced degree as required under the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us. Counsel does not directly challenge that determination and we concur with the director for the reasons discussed below.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.)

Citizenship and Immigration Services (CIS) may not ignore a term of the alien certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Commr. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). CIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [alien employment certification application form]." *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: Master's
Major Field of Study: Comp. Sci/Business/Economics

Experience: 1 year in job offered or related occupation.

Block 15: "Will accept Bachelors degree with 3 years' additional experience.

We interpret the information provided in Boxes 14 and 15 as requiring *either* a Master's degree plus one year of experience in the job offered or a related occupation *or* a baccalaureate plus three years of experience. Even if we were to read the phrase "additional experience" in Block 15 to mean three years of experience in addition to the one year of experience already mandated in Block 14, the most generous interpretation, the job still requires, at a minimum, a bachelor's degree plus four years of experience.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

As noted by counsel, the provision that allows a bachelor's degree plus five years of progressive experience to be considered "equivalent" to a Master's degree does not derive from the statute itself, but the legislative history. Specifically, the Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 121 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990). Thus, the regulatory requirement that the equivalent of a Master's degree for purposes of the classification sought requires at least five years of post-baccalaureate experience is based on Congressional intent as clearly expressed in the joint explanatory statement and is not contradictory to the statute.

At issue are not the beneficiary's actual qualifications, as counsel implies. Rather, at issue are the minimum job requirements. A job offer that does not require a member of the professions holding an advanced degree cannot support a petition under section 203(b)(2) of the Act. 8 C.F.R. § 204.5(k)(4). Counsel does not address 8 C.F.R. § 204.5(k)(4) or explain how the job offer, which only requires, at minimum, a baccalaureate plus less than five years of experience, requires a member of the professions holding an advanced degree as defined at 8 C.F.R. § 204.5(k)(2).

In light of the above, we uphold the director's finding that the job certified by DOL cannot support a petition pursuant to section 203(b)(2) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

This denial is without prejudice to the filing of a new petition under a lesser classification.

ORDER: The appeal is dismissed.